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DETERMINING THE OBLIGATION TO DEFEND UNDER INDEMNITY CONTRACTS GOVERNED BY LOUISIANA LAW

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For several years it has been difficult to determine when an indemnitor has an obligation to defend an indemnitee under the terms of an indemnity agreement governed by Louisiana law. Indemnitees have argued that, even where the indemnitor is not obligated to indemnify the indemnitee for his own negligence or fault, the indemnitor should be required to pay the indemnitee's defense costs when the indemnitee is ultimately found to be free of fault. Indemnitors, on the other hand, argue that they should not be required to defend any case containing allegations, which if proved, would preclude indemnification for the judgment against the indemnitee. As Judge Politz observed in *Sullen v. Missouri Pacific Railroad Co.*,[1] the response of the courts has been ambivalent. In both state and federal courts applying Louisiana law, some cases have accepted the indemnitees' arguments and other cases have accepted the indemnitors' arguments. Other states are also split. Florida, North Dakota, and Alaska hold that the pleadings rather than the outcome on the liability issue determine the obligation to defend.[2] Iowa and Georgia look to the outcome on the liability issue and adopt the indemnitees' arguments on the obligation to defend.[3] This article will trace the history of the obligation to defend in cases applying Louisiana law. It will also present the arguments in favor of both the pleading and outcome approaches and discuss how these arguments apply to common indemnity situations.

THE HISTORY OF THE OBLIGATION TO DEFEND IN FEDERAL COURT

The history of the obligation to defend in federal court can be divided into four major periods. During the first period, which covers

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1. 750 F.2d 428, 432 (5th Cir. 1985).

2. Stephan & Sons v. Municipality of Anchorage, 629 P.2d 71 (Alaska 1981); Conrad v. Suhr, 274 N.W.2d 571 (N.D. 1979); Pender v. Skillcraft Indus., 358 So. 2d 45 (Fla. Dist. Ct. App. 1978).

3. Hartline-Thomas, Inc. v. Arthur Pew Constr. Co., 151 Ga. App. 598, 260 S.E.2d 744 (1979); Rauch v. Senecal, 253 Iowa 487, 112 N.W.2d 886 (Iowa 1962).

the time before *Stephens v. Chevron Oil Co.*[4] and *Smith v. Chevron Oil Co.*,[5] the obligation to defend was never the major issue in a case. The second period began the day that *Stephens* and *Smith* were decided and ended when *Sullen* was decided. During this period, the federal courts routinely followed *Stephens* and *Smith* when they appeared to be applicable. This period ended when *Sullen* declared that *Stephens* had misstated Louisiana law on the obligation to defend. During the third period, lasting less than a year, *Sullen* was followed without much criticism. Opinions in the fourth period criticized *Sullen* and recognized the apparent inconsistency in the Louisiana cases addressing the issue.

The First Period

The federal courts quickly established that the duty to indemnify included the duty to defend. As early as 1955 in *Pure Oil Co. v. Geotechnical Corp.*,[6] the district court observed that "[t]here seems little question that, whether the indemnity is implied in law or arises under contract, reasonable counsel fees and costs incurred in resisting the liability indemnified against may be recovered."[7] No case before or since *Pure Oil* has argued that the indemnitor should be relieved of responsibility for defense costs in a case where the indemnitor is required to pay a judgment against an indemnitee. Aside from the quoted language, *Pure Oil* said little about the obligation to defend.

The cases following *Pure Oil* during the first period also said little about the obligation to defend. They tended to dispose of the issue in a few sentences, often without reference to any source of authority and with no discussion of how the obligation to defend ought to be determined. When authority was cited, the citation was usually to a case which had itself disposed of the issue in a few short sentences without giving any reasons to support the conclusion. While some of the cases admitted that Louisiana law controlled the interpretation of the indemnity agreement, few cited any Louisiana cases to support their conclusion on the indemnitor's duty to defend.

While the cases decided during the first period spent little time discussing the issue, a close analysis of the decisions reveals a pattern. When the injured party's claim was not covered by the indemnity agreement, attorneys' fees were not awarded regardless of the outcome of the case.[8] When the injured party's claim was covered by the contract,

4. 517 F.2d 1123 (5th Cir. 1975).

5. 517 F.2d 1154 (5th Cir. 1975).

6. 129 F. Supp. 194 (E.D. La. 1955).

7. 129 F. Supp. at 198.

8. See Cole v. Chevron Chem. Co., 477 F.2d 361 (5th Cir.), cert. denied, 414 U.S. 978, 94 S. Ct. 300 (1973)(injured party won); Despaux v. California Co., 286 F. Supp. 558 (E.D. La. 1968)(case settled).

the courts awarded attorneys' fees regardless of the outcome of the case.[9] The issue of attorneys' fees and costs in these cases turned on whether the contract covered the injured party's claim.[10]

In determining this issue, allegations of indemnitee fault created the most controversy.[11] Most of the contracts in cases from the first period required the indemnitor to indemnify the indemnitee against any claims brought by the indemnitor's employees. The courts usually found that these contracts covered claims alleging that the indemnitee was at fault.[12] Nevertheless, when the indemnity clause at issue did not concern claims made by the indemnitor's employees, the courts were less likely to interpret the contract as covering claims alleging that the indemnitee was at fault.[13]

The Second Period

The second period began with *Smith v. Chevron Oil Co.*[14] and *Stephens v. Chevron Oil Co.*,[15] the first cases where the obligation to defend was a major issue. Unlike the earlier cases, these cases devoted more than a few lines to the issue, but they too failed to consult the existing Louisiana cases which had disposed of claims for attorneys' fees and defense costs.

In *Smith*, an employee of Ocean Sciences, an independent contractor of Chevron, sued Chevron for negligently maintaining a rope used to transfer men between a platform and a boat. Chevron tendered its defense to Ocean Sciences pursuant to the indemnity agreement which required Ocean Sciences to defend and indemnify Chevron against con-

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9. See Loffland Bros. Co. v. Roberts, 386 F.2d 540 (5th Cir. 1967), cert. denied, 389 U.S. 1040, 88 S. Ct. 778 (1986)(injured party won); Cormier v. Rowan Drilling Co., 67 F.R.D. 102 (E.D. La. 1975), aff'd, 549 F.2d 963 (5th Cir. 1977)(injured party won); Storm Drilling Co. v. Atlantic Richfield Corp., 386 F. Supp. 830 (E.D. La. 1974)(injured party lost); Elston v. Shell Oil Co., 376 F. Supp. 968 (E.D. La. 1973), aff'd, 495 F.2d 1371 (5th Cir. 1974)(injured party won); Todd v. James E. Dean Marine Divers, Inc., 325 F. Supp. 18 (E.D. La. 1971), aff'd, 453 F.2d 1313 (5th Cir. 1972)(case settled); Williams v. California Co., 289 F. Supp. 376 (E.D. La. 1968)(injured party lost); White v. California Co., 260 F. Supp. 586 (W.D. La. 1965)(case settled); Collette v. Marine Exploration Co., 213 F. Supp. 609 (E.D. La. 1963)(injured party lost); *Pure Oil*, 129 F. Supp. 194 (injured party won).

10. See *Loffland*, 386 F.2d 540; Cole v. Chevron Chem. Co., 334 F. Supp. 263 (E.D. La. 1971), rev'd, 477 F.2d 361 (5th Cir.), cert. denied, 414 U.S. 978, 94 S. Ct. 300 (1973); *Collette*, 213 F. Supp. 609.

11. See *Loffland*, 386 F.2d 540; *Cole*, 334 F. Supp. 263; *Williams*, 289 F. Supp. 376.

12. See *Loffland*, 386 F.2d 540; *Todd*, 325 F. Supp. 18; *Williams*, 289 F. Supp. 376; *White*, 260 F. Supp. 586. But see *Despaux*, 286 F. Supp. 558.

13. See *Cole*, 477 F.2d at 368.

14. 517 F.2d 1154 (5th Cir. 1975).

15. 517 F.2d 1123 (5th Cir. 1975).

tract related personal injury claims brought by Ocean Sciences' employees.[16] Ocean Sciences refused to defend or indemnify Chevron. The district court found that Chevron's negligence was the sole cause of the accident and denied Chevron's defense and indemnity claim, because the indemnity agreement did not provide for indemnity by Ocean Sciences for Chevron's own negligence.[17] On appeal Chevron argued that, even if the contract did not provide for indemnity for its own negligence, it did require Ocean Sciences to pay for the costs of Chevron's defense. The appeals court found that the obligation to defend was not severable from the obligation to indemnify, and therefore, there was no obligation under the agreement to defend Chevron against its own negligent acts. In making this finding, the court cited *Despaux v. California Co.*[18] and stated:

> [T]he duty to defend [is] an extension of the duty to indemnity [sic] and . . . the indemnitor ha[s] no contractual obligation to reimburse the indemnitee for its costs in defending its own negligence. . . .
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> Inasmuch as Ocean Sciences is not obligated to indemnify Chevron for Chevron's negligence under the contractual provision in question, we hold that Ocean Sciences is not required to reimburse Chevron for the cost which it incurred in defending Smith's claim.[19]

While *Smith* involved a situation in which the indemnitee was the sole party found at fault, in *Stephens*, decided on the same day, the court discussed the situation where neither the indemnitee nor the indemnitor was ultimately found at fault. Stephens was an oil worker employed by Axelson, an independent contractor of Chevron. He sued Chevron, alleging that Chevron negligently allowed its workboat and wharf to become slick with oil, thus causing the accident. No other

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16. The indemnity agreement provided, in pertinent part:
"Contractor [Ocean Sciences] agrees to defend and hold Company [Chevron] indemnified and harmless from and against any loss, expense, claim or demand for:
"(a) Injury to or death of Contractor's employees or for damage to or loss of Contractor's property in any way arising out of or connected with the performance by Contractor of services hereunder."
517 F.2d at 1156.

17. This departure from the pattern set by earlier cases which found that similar contract language covered claims of indemnitee negligence brought by the indemnitor's employees (see cases cited supra note 12) was caused by a change in the attitude of the Louisiana courts concerning the type of language necessary to cover claims of indemnitee negligence. See *Cole*, 477 F.2d at 368.

18. 286 F. Supp. 558 (E.D. La. 1968).

19. 517 F.2d at 1158.

defendants were named and no basis for liability other than Chevron's independent negligence was alleged. Chevron tendered its defense to Axelson under an indemnity clause identical to the clause in *Smith*,[20] and Axelson refused to accept the tender. Chevron then filed a third party claim against Axelson for indemnification and reimbursement of expenses. Before trial the district court dismissed the third party demand. The jury found that Chevron was not negligent and denied Stephens' claim. The appeals court stated that, although the indemnity provision did not entitle Chevron to be indemnified against its own negligence, had the suit against Chevron been based upon anything other than its own negligence, then the indemnity clause would probably have been applicable.[21] The court stated that under Louisiana law the intent of the parties is of paramount importance in interpreting a written agreement. Then, without citing any authority from Louisiana or elsewhere, the court simply stated:

> Under these rules of construction, the contract between Chevron and Axelson clearly created a duty on the part of Axelson to defend and hold Chevron harmless against the claim of Stephens, if it in any way arose out of or was connected with Axelson's services to Chevron.[22]

The court interpreted the agreement as covering all claims in any manner connected with Axelson's presence and provision of services to Chevron with one small exclusion that relieved Axelson of any obligation to pay a judgment based solely on Chevron's own negligence.

In reaching its conclusion, it is obvious that the court in *Stephens* relied in part upon the ultimate outcome of the case and did not rely solely upon the pleadings and the terms of the contract. The opinion in *Smith*, standing alone, is not as clear. A person reading *Smith* for the first time, without knowledge of *Stephens*, would have no reason to believe that the *Smith* court consulted the outcome of the trial rather than relying exclusively on the pleadings. When *Smith* and *Stephens* are read together, however, it is clear that on August 22, 1975, the fifth circuit clearly took the position that the final outcome on the merits determined the indemnitor's obligation to defend the case from the beginning of the action.

After *Smith* and *Stephens*, the cases of the second period reverted to the old practice of deciding the defense issue with little discussion. The pattern of decisions, however, showed a marked change, as the outcome on the liability issue clearly became an important factor in

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20. See supra note 16.
21. 517 F.2d at 1125.
22. Id.

deciding whether to award attorneys' fees. As in the first period, courts awarded attorneys' fees when the contract expressly provided for indemnity for the indemnitee's negligence regardless of the outcome on the liability issue.[23] If the contract did not expressly provide for indemnity for the indemnitee's own negligence and the indemnitee was ultimately found to be negligent, neither defense nor indemnity was owed.[24] If the contract did not expressly provide for indemnity for the indemnitee's own negligence, and the indemnitee was ultimately found free of fault, the indemnitor was required to pay the indemnitee's defense costs.[25] If the contract covered all claims except those caused solely by the indemnitee's own negligence, defense costs were awarded if the indemnitee was found free of fault or if anyone other than the indemnitee was found to be partially at fault.[26]

The district courts tried to extend the rationale of *Smith* and *Stephens* to strict liability claims by refusing to award attorneys' fees where the contract did not specifically mention strict liability and the indemnitee was found to be strictly liable, but the fifth circuit refused to extend the rationale when the case was based solely on strict liability.[27] When the case was based upon both strict liability and negligence, however, the *Smith/Stephens* approach appears to have been applied. Where the contract did not specifically mention either negligence or strict liability, and the indemnitee was found to be free of both negligence and strict liability fault, defense costs were awarded.[28] Likewise, when the contract specifically covered the indemnitee's own negligence, attorneys' fees were

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23. See Thibodeaux v. Texas E. Transmission Corp., 548 F.2d 581 (5th Cir. 1977). *Thibodeaux* was settled before trial and thus there was no finding on the negligence issue which could affect the defense issue.

24. See *Smith*, 517 F.2d 1154; Samuel v. Chevron U.S.A., Inc., 587 F. Supp. 462 (M.D. La. 1984)(The contract did not specifically mention negligence, but the court said that it would have awarded attorneys' fees even if the indemnitee had been negligent. 587 F. Supp. at 465. The basis for this dicta is unclear.).

25. See Lirette v. Popich Bros. Water Transp., Inc., 699 F.2d 725 (5th Cir. 1983); Hobbs v. Teledyne Movible Offshore, Inc., 632 F.2d 1238 (5th Cir. 1980); *Stephens*, 517 F.2d 1123.

26. See Smith v. Shell Oil Co., 746 F.2d 1087 (5th Cir. 1984)(The opinion does not mention defense costs, but indemnity was required, and under *Pure Oil* if indemnity is owed, defense is also owed.); Dozier v. J.A. Jones Constr. Co., 587 F. Supp. 289 (E.D. La. 1984). Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982), cert. denied, 463 U.S. 1026, 103 S. Ct. 3536 (1983), contained similar contract language, but neither indemnity nor attorneys' fees were awarded because the act which caused the injury was found to be outside the scope of the contract.

27. See Hyde v. Chevron U.S.A., Inc., 514 F. Supp. 740 (E.D. La. 1981), rev'd, 697 F.2d 614 (5th Cir. 1983). See also Olsen v. Shell Oil Co., 595 F.2d 1099 (5th Cir.), cert. denied, 444 U.S. 979, 100 S. Ct. 480 (1979).

28. See O'Neal v. International Paper Co., 715 F.2d 199 (5th Cir. 1983).

awarded when the indemnitee was sued both on the basis of strict liability and negligence.[29]

Near the end of the second period, the newly enacted Louisiana Oilfield Indemnity Act [30] (the Act) began to create questions about the results required by the *Smith/Stephens* approach. The Act declared void all contract provisions requiring defense and indemnity for the indemnitee's own negligence or strict liability. In *Home Insurance Co. v. Garber Industries*,[31] the western district said that under the Act, the indemnitee was prohibited from recovering damages assessed or defense costs if it was ultimately found liable, but that it could recover defense costs if it were ultimately found not liable. A few years later, however, the same court rejected an argument that the indemnitee could recover defense costs if it were ultimately found not liable and pointed out that the Act specifically refers to and invalidates *defense* provisions as well as indemnity provisions.[32]

The Third Period

The second period came to an end and the third period began early in 1985 when the fifth circuit reconsidered the obligation to defend under a *Stephens* type indemnity clause in *Sullen v. Missouri Pacific Railroad Co.*[33] For the first time a federal court carefully examined Louisiana case law on the issue before reaching its decision. Broadmoor contracted with Chevron to provide workmen to clean tank cars at Chevron's plant. Sullen, an employee of Broadmoor, sued Chevron alleging that Chevron's negligence caused his injuries. Sullen made no allegations which would provide for liability on any other basis. Chevron filed a third party indemnity demand against Broadmoor. Chevron also filed a motion for summary judgment, claiming that it was Sullen's statutory employer and thus the action was barred by worker's compensation law, and Broadmoor filed a motion for summary judgment on the indemnity demand. The trial court granted Chevron's motion and declared Broadmoor's motion moot because the primary claim had been dismissed. Chevron appealed, arguing that the indemnity claim was not moot because it was entitled to recover attorneys' fees and the costs of its defense. The court observed an apparent parallel between Louisiana

29. See Mallory v. Hydraulic Workover, Inc., 617 F.2d 1212 (5th Cir. 1980).

30. La. R.S. 9:2780 (Supp. 1986)(also known as the Louisiana Oilfield Anti-Indemnity Act).

31. 588 F. Supp. 1218 (W.D. La. 1984).

32. See Aucoin v. Pelham Marine, Inc., 593 F. Supp. 770 (W.D. La. 1984).

33. 750 F.2d 428 (5th Cir. 1985)(The contract in *Sullen* was entered into before the Louisiana Oilfield Indemnity Act was enacted and thus the Act had no effect upon the decision.).

indemnity cases and insurance cases discussing the obligation to defend. Relying on the more expansive insurance cases and the specific language in two opinions referring to the allegations in the pleadings as a controlling factor, the fifth circuit decided that Louisiana law required the court to examine the pleadings to see whether indemnity would be required if the plaintiff proved any set of facts alleged in his pleadings. If the plaintiff alleged a set of facts which would require indemnity if proved, the indemnitor was obliged to defend. If no set of facts which would require indemnity were alleged, no defense was owed. According to the *Sullen* court, Louisiana law was clear, and *Stephens* was in error because it failed to consider controlling Louisiana cases. Furthermore, other controlling cases had been decided since *Stephens* which were contrary to *Stephens*. As the court observed:

> Whether a party is obliged to tender a defense to another party depends entirely upon the allegations in the precipitating pleadings. *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So. 2d 253 (1969); *Young Oil Co. of Louisiana, Inc. v. Durbin*, 412 So. 2d 620 (La. App. 1982); *Sullivan v. Hooker Chemical Co.*, 370 So. 2d 672 (La. App. 1979); *Pearson v. Hartford Accident & Indemnity Co.*, 345 So. 2d 123 (La. App. 1977). In determining whether an indemnitor or an insurer is obligated to defend an indemnitee or insured under the terms of an indemnity or insurance contract, the Louisiana courts look exclusively to the pleadings in light of the contract provisions; the ultimate outcome of the case has no effect upon the duty to defend. *Young Oil Co. v. Durbin*; *West Brothers of DeRidder, La. Inc. v. Morgan Roofing Co., Inc.*, 376 So. 2d 345 (La. App. 1979); *Sullivan v. Hooker Chemical Co.* In seeking cost and fee reimbursement Chevron is arguing its entitlement to a defense.
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> . . .[W]e conclude that unless the contract of indemnity specifically provides for costs of defense as a separate item of indemnification, the indemnitor has no obligation to defend if the petition alleges facts which, if proven, would establish liability of the indemnitee but preclude coverage under the indemnity agreement.[34]

After applying Louisiana law to the facts of the case, the court determined that Chevron was not entitled to recover costs and attorneys' fees, because Sullen's complaint was based solely on allegations of

34. 750 F.2d at 433-34.

Chevron's negligence which, if proved, would have precluded coverage under the indemnity agreement.

Sullen appeared to settle the issue for a while. When the issue arose in *Frazier v. Columbia Gas Development Corp.*,[35] the district court turned to the opinion in *Sullen* and followed it. According to the district court, the only claims against Columbia Gas were based on allegations of Columbia's own negligence and Columbia could not be indemnified for its own negligence. Since Columbia was not entitled to indemnity on the only basis on which it could be held liable, Consolidated (the indemnitor) was not required to defend it.

Durant v. Chevron U.S.A., Inc.[36] also followed *Sullen*. Durant, an employee of Elliott, was injured on one of Chevron's drilling platforms. He sued Chevron alleging that Chevron was liable under both negligence and strict liability law. Chevron filed a third party indemnity demand against Elliott based upon an agreement in which Elliott was to defend and indemnify Chevron against any contract related injury claims brought by Elliott's employees.[37] After considering the Louisiana Oilfield Indemnity Act, the court found that Chevron would not be entitled to indemnity for liability based on either negligence or strict liability. Since the pleadings only alleged bases for liability which would exclude indemnity coverage, the court following *Sullen* found that Elliott had no duty to defend Chevron.

At first glance, *Wilson v. J. Ray McDermott & Co.*[38] appears to depart from the pleading determinative rule set out in *Sullen*, but as a footnote indicates, the court was aware of *Sullen* and thought it was following it.[39] McDermott contracted with Exxon to construct a fixed platform in the Gulf. McDermott then contracted with J.R.F. Enterprises to assist in the construction. Wilson, an employee of J.R.F., was injured

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35. 605 F. Supp. 200 (W.D. La. 1985).

36. 613 F. Supp. 1189 (E.D. La. 1985).

37. The indemnity clause provided:

"[Elliott] agrees to defend and hold [Chevron] indemnified and harmless from and against any loss, expense claim or demand for:

a) Injury to or death of [Elliott's] employees or for damage to or loss of [Elliott's] property in any way arising out of or connected with the performance by [Elliott] or services hereunder; and

b) Injury to, or death of, third persons or the employees of [Chevron] or for damage to or loss of property of [Chevron] or of third persons, in any way arising out of or connected with the performance by [Elliott] of services hereunder, unless caused solely by the negligence of [Chevron]; provided that if such injury, death, damage or loss is caused by the joint or concurrent negligence of [Elliott] and [Chevron], each shall be liable for one-half of the loss, expense, claim or demand resulting therefrom."

613 F. Supp. at 1190-91.

38. 616 F. Supp. 1301 (E.D. La. 1985).

39. 616 F. Supp. at 1305 n.2.

while working on the platform. The agreement between McDermott and J.R.F. contained reciprocal indemnity provisions providing that each party would defend and hold the other party harmless from any claims brought against the other by one of its employees, regardless of fault.[40] On first consideration of the issue, the district court found that the Louisiana Oilfield Indemnity Act rendered these clauses totally void. Upon reconsideration, the court held that the clauses were only invalid to the extent that they required defense and indemnity for the indemnitee's own negligence. They remained in effect to the extent that they provided for defense and indemnity for claims not occasioned by the indemnitee's own fault. The court observed, "[a]s a practical matter, this means only that McDermott will be entitled to its costs of defense for [sic] J.R.F. Enterprises if the trier of fact finds that McDermott was not negligent or otherwise at fault."[41] The court made clear its awareness of *Sullen* by quoting the following language from that opinion: "'*[U]nless* the contract of indemnity specifically provides for costs of defense as a separate item of indemnification, the indemnitor has no obligation to defend if the petition alleges facts, which, if proven, would establish liability of the indemnitee but preclude coverage under the indemnity agreement.'"[42] The court then avoided the pleading rule set out in *Sullen* by finding that the agreement provided for defense costs as a separate item of indemnification when it stated that the "[s]ubcontractor shall be obligated to bear the expense of the investigations and defenses of all claims or demands or causes of action against which McDermott is indemnified herein, and all lawsuits and administrative proceedings arising therefrom."[43] The court interpreted this provision as entitling McDermott to the costs of its defense if it were exonerated from all fault. This statement, however, disregards the thrust of *Sullen* which is that the obligation to defend is determined without regard to the outcome unless the contract specifically states that the outcome will determine liability for defense costs. This provision merely stated that McDermott was entitled to defense if the claim was one for which it could be indemnified. As the court correctly pointed out, McDermott was not entitled to indemnification for its own fault. Thus under *Sullen*, if the pleadings alleged that McDermott was at fault, McDermott was not entitled to indemnity, and under the agreement if

40. The agreement provided: "'[J.R.F] shall be obligated to bear the *expense* of the investigations and *defenses* of all claims or demands or causes of action against which McDermott is indemnified herein, and all lawsuits and administrative proceedings arising therefrom . . . .'" 616 F. Supp. at 1305 n.2 (emphasis by the court).

41. 616 F. Supp. at 1305.

42. 616 F. Supp. at 1305 n.2 (emphasis by the court).

43. Id. (emphasis omitted).

McDermott was not entitled to indemnity, it could not be entitled to a defense.

The western district continued to follow both the letter and the spirit of *Sullen* in *Moser v. Aminoil, U.S.A., Inc.*[44] Moser, an employee of Sweco, was injured while working on a platform owned by Aminoil. He sued Aminoil alleging negligence. The district court found that the Louisiana Oilfield Indemnity Act invalidated the indemnity agreement between Aminoil and Sweco.[45] Nevertheless, Aminoil, citing *Home Insurance Co. v. Garber Industries*,[46] argued that even if it was not entitled to indemnity, it was entitled to reimbursement of defense costs if it were ultimately found free of negligence. The district court disagreed with Aminoil's reliance on *Garber*, observing that the district court in *Garber* had not had the benefit of the fifth circuit's opinion in *Sullen*. The court then applied *Sullen*, stating:

> In the instant case, Moser's complaint is based on the alleged concurrent negligence of Aminoil, Sweco and Global Marine. Section 2780 will not permit Sweco to defend or indemnify Aminoil for its concurrent negligence. Thus, as the plaintiff's precipitating pleadings do not allege facts which, if proven, would be properly covered by the indemnity agreement, the claim for contractual indemnity must fall *in toto*.[47]

The western district also followed *Sullen* in *Heath v. Superior Oil Co.*[48] Heath, an employee of Wire-Tech Services, was injured while working on a fixed platform owned by Superior Oil. When Heath sued Superior alleging concurrent negligence on the part of Superior and Wire-Tech, Superior sought contractual indemnity and defense from Wire-Tech under an indemnity agreement which provided indemnity to Superior for losses caused by its sole or concurrent negligence.[49] The court found that the Louisiana Oilfield Indemnity Act invalidated the indemnity agreement and denied the claim for defense, since Heath's pleadings alleged concurrent negligence on the parts of Superior and

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44. 618 F. Supp. 774 (W.D. La. 1985).

45. The indemnity agreement provided:

> "[Sweco] shall hold harmless, defend and indemnify [Aminoil] from and against all losses, damages, demands, claims, suits, and other liabilities, including counsel fees and other expenses of litigation, arising out of or related to services performed by [Sweco], its agents, or employees, or subcontractors; unless such liabilities or losses result from the sole negligence or willful misconduct of [Aminoil], its agents, or employees."

618 F. Supp. at 778.

46. 588 F. Supp. 1218 (W.D. La. 1984).

47. 618 F. Supp. at 781.

48. 617 F. Supp. 33 (W.D. La. 1985).

49. 617 F. Supp. at 34-35.

Wire-Tech. In reaching this decision, the court relied on *Moser*, which followed *Sullen*.

The fifth circuit considered the impact of the Louisiana Oilfield Indemnity Act on the obligation to defend in *Laird v. Shell Oil Co.*[50] Laird was an employee of L & L Sandblasting, a contractor hired by Shell to repaint one of its platforms. Laird was injured when a rope on the platform broke. He sued Shell alleging negligence, and Shell filed a third party indemnity and defense claim against L & L pursuant to an agreement which required L & L to defend and indemnify Shell against contract related personal injury claims which were not caused solely by Shell's negligence.[51] The jury found that Shell was not negligent. The court applied *Sullen* and concluded that L & L had no duty to defend, because the complaint alleged facts which, if proved, would establish Shell's sole liability and preclude coverage under the agreement. Since L & L had no duty to defend, it also had no duty to reimburse the costs of defense. The *Laird* court recognized and distinguished *Livings v. Service Truck Lines of Texas, Inc.*,[52] which appears to conflict with *Sullen*,[53] on the ground that the agreement in *Livings* was not as limited as the agreement in *Sullen* and pointed out that *Sullen* was consistent with another Louisiana appellate case, *Sullivan v. Hooker Chemical Co.*[54]

The effect of the Louisiana Oilfield Indemnity Act on the obligation to defend was discussed again in *Alexander v. Chevron U.S.A., Inc.*[55] Alexander, an employee of Champion Oil & Gas, was injured on a platform owned by Chevron. Alexander sued Chevron alleging negligent maintenance and supervision of the platform and strict liability. Chevron filed a third party demand against Champion under an agreement in which Champion agreed to defend and indemnify Chevron against contract related personal injury claims brought by Champion employees.[56]

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50. 770 F.2d 508 (5th Cir. 1985).

51. The indemnity clause provided:

"[L & L agrees to] defend and indemnify Shell . . . against all losses, claims, suits, liability, and expense arising out of injury or death of persons (including employees of Shell, [L & L] or any subcontractor) . . . resulting from or in connection with the performance of this order and not caused solely by Shell's negligence without any contributory negligence or fault of [L & L] or any subcontractor or their employees or agents."

770 F. 2d at 511.

52. 467 So. 2d 595 (La. App. 3d Cir. 1985).

53. See discussion of *Livings* in text accompanying infra notes 64-65.

54. 370 So. 2d 672 (La. App. 4th Cir.), rev'd on other grounds, 376 So. 2d 500 (1979).

55. 623 F. Supp. 1462 (W.D. La. 1985).

56. The indemnity clause provided:

"Contractor [Champion] agrees to defend and hold Company [Chevron] in-

Champion moved for summary judgment on the indemnity and defense claim, arguing that the indemnity agreement was voided by the Louisiana Oilfield Indemnity Act. Judge Veron described the current status of the defense issue when he observed:

> While it is clear that no defense or indemnity is owed where the indemnitee is at least partially at fault, the issue upon which the federal district courts of Louisiana have become divided is essentially whether or not the OAIA [Louisiana Oilfield Anti-Indemnity Act] prohibits the indemnitor from being obliged to pay the costs of defense if the indemnitee is ultimately found free from fault by the trier of fact. In *Aucoin v. Pelham Marine, Inc.*, 593 F.Supp. 770 (W.D.La.1984), Senior District Judge Hunter held that if the OAIA is applicable, not only are the indemnity provisions of the contract invalidated, but any duty to defend is also nullified and the indemnitor owes no duty to defend the indemnitee. *Id.* at 776-77. This Court has subsequently followed and embellished this rationale in the case of *Moser v. Aminoil, U.S.A., Inc.*, 618 F.Supp. 774 (W.D.La.1985). Other federal district courts, however, have ruled in accordance with *Home Insurance Co. v. Garber Industries, Inc.*, 588 F.Supp. 1218 (W.D.La.1984), wherein Judge Shaw held that the OAIA nullified the indemnity agreements to the extent that they purported to require the indemnitors to indemnify and defend the indemnitees against the consequences of the indemnitees' own negligence, *but* that the indemnitees would yet be entitled to the costs of defense if the jury subsequently found that the indemnitees were not negligent and were free from fault. *Id.* at 1222-23. Under this line of reasoning, a factual question as to the existence or absence of Chevron's sole or concurrent negligence or fault would preclude summary judgment in the case at bar.[57]

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demnified and harmless from and against any loss, expense, claim or demand for:

(a) injury to or death of Contractor's employees, or for damage to or loss of Contractor's property in any way arising out of or connected with the performance of Contractor of services hereunder; and

(b) injury to or death of third persons or the employees of Company, or for damage to or loss of property by Company or of third persons in any way arising out of or connected with the services by Contractor of services hereunder, unless caused solely by the negligence of Company; provided that if such injury, death, damage or loss is caused by the joint or concurrent negligence of Contractor and Company, each shall be liable for one-half of the loss, expense, claim or demand resulting therefrom.

623 F. Supp. at 1464.

57. 623 F. Supp. at 1465.

Like the court in *Moser*, Judge Veron correctly resolved the problem by pointing out that *Garber* was decided without the benefit of *Sullen* and *Laird*, and thus was an incorrect statement of the law. If the Louisiana Oilfield Indemnity Act nullifies any obligation which might exist in a case to indemnify the indemnitee, it also nullifies any obligation in the case to defend the indemnitee.[58] Any duty which Champion owed to indemnify Chevron was nullified, so Champion had no duty to defend Chevron and was entitled to summary judgment.

While the western district was considering the effect of *Sullen* and *Laird* and the Louisiana Oilfield Indemnity Act in *Alexander*, the eastern district was wrestling with the same problem in *Jackson v. Tenneco Oil Co.*[59] Unfortunately, the *Jackson* court reached a different conclusion than the *Alexander* court, and the exact status of the law remained unclear. Jackson, an employee of Halliburton, was injured while working on a platform owned by Tenneco. Jackson alleged that his injuries were caused by the concurrent negligence of Halliburton, Bootstrap and Tenneco. The claims against Halliburton were dismissed by summary judgment, and Tenneco filed a third party demand against Halliburton for indemnity and defense. The contract between Halliburton and Tenneco contained reciprocal indemnity clauses requiring each party to assume full responsibility for claims of its employees regardless of who was at fault.[60] Halliburton moved for summary dismissal of the indemnity and

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58. Id.

59. 623 F. Supp. 1452 (E.D. La. 1985).

60. The indemnity agreement provided:

"A. [Tenneco] agrees to defend, indemnify and hold [Halliburton], its subsidiary and affiliate companies, their agents, employees, directors, officers, servants, and insurers, harmless from and against any and all losses, claims, demands, liabilities or causes of action of every kind and character, in favor of any person or party, for injury to or illness or death of any employee of [Tenneco] or its joint interest owners, which injury, illness or death arises out of or is incident to the work performed under this Contract, and regardless of the cause of such injury, illness or death, even though caused in whole or in part by a pre-existing defect, indemnitees' negligence or strict liability, or other legal fault of indemnitees. [Tenneco] shall fully defend any such claim, demand or suit as [sic] its sole expense, even if the same is groundless.

"This indemnity shall be limited to the extent necessary for compliance with applicable State and Federal laws.

"B. [Halliburton] agrees to defend, indemnify and hold [Tenneco], its joint interest owners, its subsidiary and affiliate companies, their agents, employees, directors, officers, servants, and insurers, harmless from and against any and all losses, claims, demands, liabilities or causes of action of every kind and character in favor of any person or party, for injury to or illness or death of any employee of [Halliburton] or any employee of subcontractors of [Halliburton], which injury, illness or death arises out of or is incident to the work performed under this Contract, and regardless of the cause of such injury,

defense claim on the ground that the indemnity agreement was invalidated by the Louisiana Oilfield Indemnity Act.

On original hearing, the court found the indemnity agreement invalid insofar as it provided for indemnity and defense for Tenneco's own negligence. Nevertheless, if Tenneco were completely exonerated of fault at trial, it would be free to pursue its claim for defense costs against Halliburton.

The court then decided to reconsider its ruling in light of *Sullen* and *Laird*.[61] On reconsideration, the court found that *Sullen* required it to examine the pleadings and the terms of the agreement to determine whether the contract separated the obligation to defend from the obligation to indemnify and if not, whether the pleadings alleged facts which, if proved, would exclude indemnity and, therefore, defense. The court then found that the Tenneco-Halliburton contract did not contain a separate obligation to defend. Nevertheless, the court found that the pleadings did not preclude coverage under the terms found on the face of the contract. Therefore, according to the court, the contract did not preclude defense. After applying *Sullen* in isolation, the court applied the Louisiana Oilfield Indemnity Act and held that, insofar as the contract allowed defense where Tenneco was negligent, the contract was void. Thus, the court said that while Tenneco could not enforce the agreement by requiring Halliburton to defend it, Tenneco could assert its claim for costs of defense and attorneys' fees if it were ultimately found free of fault.

With all due respect, this analysis flies in the face of the rationale behind *Sullen* and *Laird*. Under *Sullen* and *Laird*, the obligation to defend depends upon whether the pleadings allege facts which, if proved, would preclude indemnity under the contract. If the Louisiana Oilfield Indemnity Act invalidates that part of the contract which would allow indemnity and therefore defense, then that provision of the contract is treated as if it had never existed. Thus, the provision of the contract which would prevent exclusion from coverage by proof of the alleged facts is without effect, and proof of the alleged facts excludes coverage. Once proof of the alleged facts excludes coverage, *Sullen* and *Laird*, as well as the Louisiana Oilfield Indemnity Act, relieve the indemnitor of the obligation to defend and the obligation to reimburse defense costs. The pleadings, not the outcome of the case, control the obligation to defend and, therefore, the obligation to pay defense costs.

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illness or death, even though caused in whole or in party [sic] by a pre-existing defect, indemnitees' negligence or strict liability, or other legal fault of indemnitees. [Halliburton] shall fully defend any such claim, demand or suit at its sole expense, even if the same is groundless."

623 F. Supp. at 1454.

61. 623 F. Supp. at 1459.

The Fourth Period

Despite the existence of *Sullen* and *Laird*, oil companies continued to argue that, even if they were not entitled to indemnity from their contractors, they were entitled to recover the costs of successfully defending negligence claims brought by employees of the contractors. The fourth period began when Chevron argued in *Knapp v. Chevron U.S.A., Inc.*[62] that it was entitled to reimbursement of defense costs because it had been found free of fault.[63] The fifth circuit quickly rejected Chevron's argument and continued to follow *Sullen*. In continuing to rely upon its analysis in *Sullen*, the court recognized that *Sullen*'s holding conflicted with *Livings v. Service Truck Lines of Texas, Inc.*, but the court declined to follow *Livings* which, "without citation of authority or discussion, deferred the determination of a party's right to a defense until after that party's 'negligence or fault' has been 'fully explored.'"[64] The court noted further that, "*Livings* conflicts with *Sullivan v. Hooker Chemical Co.* authored by Justice Lemmon of the Louisiana Supreme Court, while a member of a Louisiana intermediate appellate court."[65]

Even after *Knapp*, the issue did not die. One by one, Louisiana cases were discovered which apparently did not apply the standard which *Sullen* had said was clearly the law in Louisiana. Some were decided before *Sullen*, and others were decided after it.

In *Doucet v. Gulf Oil Corp.*,[66] the fifth circuit faced the same situation that was at issue in *Alexander* and *Jackson*. Doucet, an employee of Danos, was injured while working on a platform owned by Gulf. Danos had contracted with Gulf to provide general oil field labor and other services. When Doucet sued Gulf, Gulf tendered its defense to Danos under their contract which required Danos to indemnify Gulf "'against all costs, expenses, and attorney's fees incurred by Gulf in the defense of . . . causes of action . . . on account of personal injuries . . . whether arising out of negligence on the part of Gulf or otherwise, including . . . any theory of strict liability, . . . arising out of the work performed by [Danos].'"[67] Danos refused to defend, and the district court originally granted Gulf's demand for contractual indemnity and

62. 781 F.2d 1123 (5th Cir. 1986).

63. Knapp, an employee of PBW, was injured while painting a platform owned by Chevron. He sued Chevron, claiming that Chevron had been negligent in its maintenance of the platform. Chevron filed a third party demand against PBW under a contract in which PBW agreed to defend and indemnify Chevron against contract related personal injury claims brought by PBW employees. After a trial, the district court found Chevron to be free of negligence or fault.

64. 781 F.2d at 1128 (citation omitted).

65. Id. (citation omitted).

66. 783 F.2d 518 (5th Cir. 1986).

67. 783 F.2d at 521.

defense. The district court then reversed itself and dismissed the third party complaint. On appeal, the fifth circuit found that, under *Sullen*, *Knapp*, and the Louisiana Oilfield Indemnity Act, an indemnitee is not entitled to defense where the allegations are based upon negligence or strict liability. Since Doucet's claims were based upon allegations of Gulf's negligence and strict liability, Gulf was not entitled to the costs of defense.

Even the decision in *Doucet* did not settle the issue. The criticism of *Sullen* came to a head in *Waller v. Chevron, U.S.A., Inc.*,[68] when Judge Parker refused to read *Sullen*, *Knapp*, and *Doucet* to relieve an indemnitor of the obligation to pay the costs of defense if the indemnitee is ultimately found free of fault. According to Judge Parker, such a result "stands the law of indemnity upon its head."[69] The opinions in *Sullen*, *Knapp*, and *Doucet*, wrote Parker, "simply cannot stand for the proposition . . . because that court [the fifth circuit] would never accept such a bizarre notion. Moreover, those decisions were rendered without consideration of the *Harper* and *Rodriguez* cases and in two of them, without consideration of the *Livings* decision as well."[70]

Waller, an employee of Engineered Mechnical Services (EMS), was injured on a platform owned by Chevron. He sued Chevron alleging negligence and strict liability. Chevron filed a third party demand for defense and indemnity against EMS and its insurer, Maryland Casualty, based on an agreement in which EMS agreed to defend and indemnify Shell against contract related personal injury claims brought by EMS employees.[71] In a motion for summary judgment, Maryland argued that

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68. 630 F. Supp. 313 (M.D. La. 1986).

69. 630 F. Supp. at 315.

70. Id. at 318 (citing Harper v. Brown & Root, Inc., 383 So. 2d 1079 (La. App. 3d Cir. 1980)(see text accompanying infra notes 84-87), and Rodriguez v. Illinois Cent. Gulf R.R. Co., 395 So. 2d 1369 (La. App. 1st Cir. 1981)(see text accompanying infra notes 88-89)).

71. The indemnity clause provided:

> "[EMS] agrees to defend and hold [Chevron] indemnified and harmless from and against any loss, expense, claim or demand for:
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> "(a) Injury to or death of [EMS's] employees or for damage to or loss of [EMS's] property in any way arising out of or connected with the performance by [EMS] of services hereunder; and
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> "(b) Injury to, or death of third persons or the employees of [Chevron], or for damage to or loss of property of [Chevron] or of third persons, in any way arising out of or connected with the performance by [EMS] of services hereunder, unless caused solely by the negligence of [Chevron]; provided that if such injury, death, damage or loss is caused by the joint or concurrent negligence of [EMS] and [Chevron], each shall be liable for one-half of the loss, expense, claim, or demand resulting therefrom.
>
> "[Chevron] shall have the right, at its option, to participate in the defense of any such suit without relieving [EMS] of any obligation hereunder."

630 F. Supp. at 314-15.

the Louisiana Oilfield Indemnity Act rendered the agreement between EMS and Chevron void and thus it had no duty to defend or indemnify Chevron.

Judge Parker rejected this argument. First he reached the conclusion that the Louisiana Oilfield Indemnity Act leaves standing that part of the agreement which provided Chevron with indemnity if it were not at fault. Then he stated that there is a vast difference between a liability insurance policy which provides for indemnity for the fault of the insured and an indemnity contract such as the one at issue, which provided indemnity only where the indemnitee is not at fault. Furthermore, he noted that liability insurance policies contain clauses requiring the insurance company to provide a defense even if the claims made against the insured are untrue, unless exclusions clearly negate coverage under the policy. Thus, according to Judge Parker, it is appropriate to look to the pleadings and the terms of the policy to determine the obligation to defend in an insurance case, since the insurer has agreed to defend even if the claims are untrue. In contrast, Judge Parker claimed:

> In the case of indemnity, it is the absence of fault of the indemnitee which is the essence of the agreement. Unless the indemnitee can demand indemnity for the cost of establishing its freedom from fault, *it can never enforce its agreement.* All plaintiffs will always allege the fault of the indemnitee (otherwise they would not be in court). To allow mere allegations of fault made by a third party to vitiate an otherwise perfectly valid agreement violates the contract, logic and common sense.[72]

Judge Parker's distinctions are not necessarily valid. As many of the cases discussed above indicate, contracts worded like the one in *Waller* have been used, in the absence of some statute invalidating them, to require an indemnitor to indemnify an indemnitee for judgments which are based upon a finding of negligence or fault on the part of the indemnitee. Thus, indemnity agreements are not necessarily based upon the absence of fault on the part of the indemnitee. Furthermore, plaintiffs will at times sue the indemnitee without claiming that the indemnitee himself has been negligent, since defendants are sometimes held liable without fault—as in the case of vicarious liability for others and absolute liability for ultrahazardous activities. Particularly in cases where indemnitees have sought indemnity even for accidents caused by their own sole or concurrent negligence, the purpose behind the indemnity agreement is not all that different from the purpose behind a liability insurance contract. Knowing that some of the activities involved in its industry can be very hazardous, the indemnitee seeks to spread the risks

72. Id. at 316 (emphasis by the court).

by contracting out some of the hazardous activity to contractors and subcontractors and requiring them to assume some of the risks. To make sure that the risks are spread, the indemnitee requires the contractor or subcontractor to agree to an indemnity clause which will assure that the indemnitee will be relieved of liability if the accidents which will potentially result from the contracted activity actually occur. The refusal of Louisiana courts to interpret indemnity contracts to require indemnity for the indemnitee's own negligence and the enactment of the Louisiana Oilfield Indemnity Act by the Louisiana Legislature are statements of policy that the indemnitees have not necessarily chosen the best or fairest way to spread the risk. The fifth circuit opinions do not stand the law of indemnity on its head. They mirror the policy of the Louisiana courts and legislature that it is unfair to the contractors and subcontractors to expect them to take the risk of defending and paying claims based on accidents that *may* have been caused by the indemnitee's fault. They leave intact the main valid purpose of indemnity agreements—to protect the indemnitee from vicarious liability based on the fault of the indemnitor. Since this valid use of indemnity agreements is left standing, neither the result nor the rationale of *Sullen*, *Knapp*, and *Doucet* are contrary to "contract, logic and common sense," and they do require courts to reach the opposite result from the one reached by Judge Parker.

It would not be accurate to say that the rationale and results reached in *Sullen*, *Knapp*, and *Doucet* are unquestionably correct. As the fifth circuit itself admitted in *Knapp*, there are Louisiana appellate court decisions which support the fifth circuit's position and decisions which contradict it. Recently, the fifth circuit followed *Sullen*, *Knapp*, and *Doucet* again in *Meloy v. Conoco, Inc.*,[73] but upon rehearing the court decided that the conflicting decisions of lower Louisiana courts merited withdrawal of its opinion and certification of the issue to the Louisiana Supreme Court.

History of the Obligation to Defend in State Court

As early as 1836, the Louisiana Supreme Court affirmed a judgment awarding attorneys' fees to an indemnitee under an indemnity contract.[74] Eleven years later in *Berry v. Slocomb*,[75] the court said: "It is quite clear that where one party thus agrees to hold another harmless, the latter may recover the cost and charges reasonably disbursed in consequence of a suit against him."[76]

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73. 784 F.2d 1320 (5th Cir. 1986), withdrawn, 792 F.2d 56 (5th Cir. 1986).
74. See Dezier v. Bougnon, 9 La. 250 (1836).
75. 2 La. Ann. 993 (1847).
76. Id.

Following *Berry*, the early Louisiana cases resemble the early federal cases. They disposed of the obligation to defend with little discussion and few citations. Although discussion was short or nonexistent, the decisions in these cases also followed a pattern. As in the early federal cases, the central question was whether the claim was covered by the indemnity provisions of the contract, yet the ultimate outcome on the liability issue had little effect upon the obligation to pay attorneys' fees.[77]

After more than a hundred years of deciding the defense issue with little discussion, the first circuit shed a little light on how the obligation should be determined in *Pearson v. Hartford Accident & Indemnity Co.*[78] Pearson, an employee of H. E. Wiese, Inc., a contractor of Shell Oil, was injured while he was at one of Shell's plants. He sued Shell and its insurer, Travelers, seeking tort damages, and in the alternative,

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77. See New Orleans Great N. R. Co. v. S.T. Alcus & Co., 159 La. 36, 105 So. 91 (1925)(The plaintiff won his case against the indemnitee and the indemnitee was awarded indemnity and attorneys' fees because the contract covered the claim.); Roberts v. Allied Chem. Corp., 369 So. 2d 1114 (La. App. 1st Cir.), cert. denied, 370 So. 2d 890 (La. 1979)(Plaintiff sued the indemnitee claiming unsafe working conditions. The district court said indemnity and defense were owed because the contract covered working conditions. The court of appeals affirmed. No outcome on the liability issue was available because the issue was decided on a summary motion.); Lee v. Allied Chem. Corp., 331 So. 2d 608 (La. App. 1st Cir.), cert. denied, 377 So. 2d 525 (1976)(Facts similar to *Roberts*, but the trial court held that no indemnity or defense was owed. The appellate court overturned, holding that the indemnitor did owe indemnity and defense because the contract covered working conditions. No outcome on the liability issue was available because the decision was rendered on a summary judgment motion.); Kirkland v. Western Elec. Co., 296 So. 2d 350 (La. App. 4th Cir. 1974)(Plaintiff sued indemnitee claiming negligence on the part of one of the indemnitor's employees. The suit against the indemnitee was dismissed and thus no outcome on the liability issue was available. The court nevertheless found that the contract covered the claim and awarded attorneys' fees.); Dixie Mach. Welding & Metal Works v. Illinois Cent. R.R., 285 So. 2d 808 (La. App. 4th Cir. 1973), cert. denied, 288 So. 2d 644 (1974)(Plaintiff sued the indemnitee and lost. The court denied attorneys' fees because the contract did not cover the claim.); Treme v. American Mut. Liab. Ins. Co., 260 So. 2d 41 (La. App. 3d Cir.), cert. denied, 262 So. 2d 40 (1972)(Plaintiff sued the indemnitee alleging negligence and lost. Court found that the claim was covered by the contract and awarded attorneys' fees.); Jennings v. Ralston Purina Co., 201 So. 2d 168 (La. App. 2d Cir.), cert denied, 203 So. 2d 554 (1967)(Plaintiff's suit was based on indemnitee negligence and attorneys' fees were awarded because the contract covered indemnitee negligence.); Hospital Serv. Dist. No. 1 v. Delta Gas, Inc., 171 So. 2d 293 (La. App. 4th Cir.), cert. denied, 173 So. 2d 540 (1965)(No outcome was available because the suit was settled. Attorneys' fees were awarded because the claim was based in part upon allegations of indemnitor negligence which was covered by the contract.); Aetna Casualty & Sur. Co. v. Palmer, 18 La. App. 142, 137 So. 545 (2d Cir. 1931)(The indemnitee was sued on an appeal bond. The indemnitor defended the indemnitee and they lost. The indemnitee appealed and won. The court awarded the indemnitee attorneys' fees.).

78. 345 So. 2d 123 (La. App. 1st Cir.), cert. denied, 347 So. 2d 255 (1977).

he sought worker's compensation benefits from his employer's insurer. Later he amended his petition to add as a defendant an employee of Shell who he alleged negligently caused the accident. Travelers claimed that Pearson was contributorily negligent and filed a third party claim against Wiese claiming that the contractor had a duty to defend Shell and its employees under the terms of the agreement.[79] The contractor claimed that it had no duty to defend where the negligence of a Shell employee was alleged to be the sole cause of the injury.

The trial court dismissed Pearson's claims. In determining that the contractor was not obligated to defend Shell or its employees, the court observed: "The suit filed by Pearson was based solely on the negligence of Champine, an employee of Shell. Under the terms of the contract there is no duty to defend where the suit is based solely on the negligence of Shell or its employees."[80] This language indicates that the court examined the terms of the contract and the pleadings in determining the duty to defend. There is no indication that the outcome of the trial had any effect upon the determination of the obligation to defend.

The fourth circuit joined the first circuit in applying a pleading approach to the determination of the obligation to defend in *Sullivan v. Hooker Chemical Co.*[81] Sullivan, an employee of Atlas Erection Co., was injured on the premises of Hooker Chemical's plant when the truck in which he was riding was struck by another truck. Sullivan claimed that the accident was caused by the negligence of the other driver in failing to stop and the negligence of Hooker and Giambelluca (another contractor) in failing to provide warnings at a blind corner. Hooker demanded that Atlas provide indemnity to it and take over its defense

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79. The agreement provided in pertinent part:

"Wiese shall defend and indemnify Shell, its employees and agents against all claims of and liability to third parties (including, without limitation, all employees of Shell or Wiese and all of their subcontractors and their employees) for injury to or death of persons or loss of or damage to property arising out of or in connection with the performance of this contract, except where such injury, death, loss, or damage has resulted from the negligence of Shell without negligence or fault on the part of Wiese or any of their subcontractors, in which case this clause shall not apply, and further provided that where such injury, death, loss, or damage has resulted from the contributory negligence of Shell, Wiese's responsibility for that portion of the claim attributable to Shell shall be limited to $250,000 each person and $500,000 each occurrence for bodily injury and property damage limits of $100,000 each accident and $100,000 aggregate. Wiese shall defend all suits brought upon such claims and pay all costs and expenses incidental thereof, but Shell shall have the right, at its option, to participate in the defense of any such suit, without relieving Wiese of any obligations hereunder."

345 So. 2d at 128-29.

80. 345 So. 2d at 128-29.

81. 370 So. 2d 672 (La. App. 4th Cir. 1979).

under the terms of the indemnity agreement between them.[82] Atlas refused and Hooker filed a third party demand against Atlas.

After a trial on the merits, the court found that the other driver was the only negligent defendant, but denied recovery because it also found Sullivan contributorily negligent. Hooker admitted that the indemnity agreement did not require Atlas to indemnify Hooker for its own negligence, but it argued that the accident was caused by the negligence of one or more of Atlas' employees and, thus, it could only be vicariously liable. Since it could only be vicariously liable, Hooker argued, Atlas owed it a defense. The court, however, rejected Hooker's reasoning, which was grounded on the ultimate outcome of the case, stating:

> Plaintiff's petition alleged Hooker was liable on the basis of its independent negligence and of its negligence or responsibility in relation to Giambelluca's contractual operations. There was no allegation of liability asserted against Hooker in relation to Atlas' contractual operations. Thus, unless the pleadings were expanded, Hooker could only have been found liable on the basis of its own negligence or that of Giambelluca.
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> . . . The contract terms provided for indemnity for Hooker's liability for Atlas' negligence, but not for Hooker's own negligence or for Hooker's liability for negligence of a third party. Under these circumstances neither indemnity nor defense is owed by Atlas.[83]

This language clearly indicates a rejection of the ultimate outcome approach and a reliance upon the pleading approach.

The Louisiana courts, however, have been far from consistent in their choice of the pleading approach over the outcome approach. The third circuit appears to have applied the outcome approach in *Harper v. Brown & Root, Inc.*[84] Harper sued his employer (Brown & Root), the utility company with which his employer had contracted (CLECO), and others for the value of tools which had mysteriously disappeared while he was working on the premises of the utility company. The utility company filed a third party defense and indemnity demand against Brown & Root. The trial court dismissed Harper's claim and ordered Brown & Root to pay the utility company's costs and attorneys' fees. On appeal, Brown & Root argued that it should not have to pay for the utility company's attorneys' fees, because the utility company was a

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82. 370 So. 2d at 676.

83. 370 So. 2d at 677.

84. 383 So. 2d 1079 (La. App. 3d Cir.), rev'd on other grounds, 391 So. 2d 1170 (1980).

defendant based on its own alleged negligence, and the indemnity contract did not purport to indemnify the utility company for its own negligence. In answering this argument, the court said:

> We concede that absent an express provision indemnifying an indemnitee against losses resulting from his own negligence indemnification will not be allowed if the cause of injury or loss sustained is shown to result from the indemnitee's own negligent act of commission or omission. We likewise concede that the contract of indemnity in this case did not contain a provision indemnifying CLECO against losses resulting through its own negligent acts. However, even assuming arguendo, that the allegations of plaintiff's petition indicate that CLECO was joined as a party defendant solely on the basis of its own alleged negligence this circumstance does not deprive CLECO of its contractual right of indemnity if it is otherwise shown to be entitled thereto. In matters of indemnity the allegations of a claimant's pleadings, as to the cause of injury, are not determinative of an indemnitee's right to indemnification. Rather, whether or not indemnification should be allowed can be determined only after liability is fixed.[85]

Although the quoted material appears to apply the outcome approach to the obligation to defend, this is not necessarily the case. The quote says that the right to indemnification can be determined only after liability is fixed. In *Harper*, unlike *Pearson* and *Sullivan*, the attorneys' fees themselves were specifically mentioned as an object of indemnification in the agreement; recovery of attorneys' fees was not simply a measure of damages for refusing to fulfill an obligation to defend.[86] Thus, the contract in *Harper* specifically provided for recovery of the costs of defense as a separate item of indemnification, and as *Sullen* observed, in such a case the indemnitor may be required to pay the attorneys' fees even though it would not be required to pay any judgment that might ultimately be rendered against the indemnitee. Furthermore,

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85. 383 So. 2d at 1082-83 (citations omitted).

86. The indemnity provisions provided:

> "Contractor shall defend and indemnify and save Purchaser and the Consulting Engineers harmless from any and all claims, losses, damages, costs and expenses, including attorney's fees, arising or alleged to arise from personal injuries, including death, or damage to property, including the loss of use thereof, and resulting from, arising out of or in connection with the WORK or alleged to result from or arise out of or in connection with the WORK, including, without limitation, all liability imposed by virtue of any law designed to protect persons employed at the WORK site."

383 So. 2d at 1082. Compare the contract terms in *Pearson*, supra note 79, and the discussion of the indemnity contract in *Sullivan*, 370 So. 2d at 376-77.

the *Harper* contract required the utility company to pay any attorneys' fees resulting from claims of *alleged* contract related injuries, which underscores the correctness of the court's result under the terms of this contract. The difference in the contract in *Harper* from the contracts in *Pearson* and *Sullivan* is emphasized by the fact that CLECO was not only allowed to recover the costs of the original defense, but it was also granted a $500.00 increase for prosecution of the appeal to enforce its right to indemnification. Generally, an indemnitee is not allowed to recover the costs of enforcing its right to indemnity.[87]

While there may be some justification for other circuits failing to follow the first circuit cases which rely on the pleading approach, the first circuit itself appears to have been inconsistent in following their own decisions. In *Rodriquez v. Illinois Central Gulf Railroad Co.*,[88] the driver of a log truck employed by a paper company sued the railroad for injuries caused when a train hit the truck he was driving as it crossed the tracks. The railroad filed a third party claim against the paper company seeking attorneys' fees and indemnity or contribution under the terms of an indemnity agreement in which the paper company agreed "to indemnify the railroad company for damages and attorneys' fees for any injury or property damage which occurred at the crossing and which was not caused by the sole fault of the railroad."[89] The trial court found that the railroad was negligent and awarded the driver damages. On appeal, the court reversed the judgment, finding that the driver's contributory negligence barred his recovery. The paper company argued that the agreement was applicable only if it was found to be negligent. The court, however, found that under the terms of the agreement, a claim was covered unless the accident was caused solely by the negligence of the railroad; who the other negligent party was did not seem to matter so long as the railroad's negligence was not the sole cause of the accident.

It appears that this case diverges from the pleading approach used in *Pearson* and *Sullivan*, but it is possible that the court reached a different conclusion because attorneys' fees were a specific and separate object of indemnification. It is also possible that the language of the contract itself forced the court to wait until the outcome of the case to determine who was responsible for the attorneys' fees. The contract language is not quoted in the opinion.

While *Rodriquez* may be consistent with the pleading approach, the first circuit clearly departed from that approach in *Lewis v. Exxon*

87. See Morris v. Schlumberger, Ltd., 445 So. 2d 1242, 1247 (La. App. 3d Cir.), cert. denied, 449 So. 2d 1345 (1984); cf. D'Albora v. Tulane University, 274 So. 2d 825, 831 (La. App. 4th Cir.), cert. denied, 278 So. 2d 504 (1973).

88. 395 So. 2d 1369 (La. App. 1st Cir. 1981).

89. 395 So. 2d at 1371.

Corp.[90] Lewis, an employee of H. E. Wiese, Inc., was injured while working at a plant owned by Exxon. Wiese contracted with Exxon to convert an ethanol unit to an isopropanol unit. Lewis sued Exxon and one of its employees alleging that their negligence caused his injuries. Exxon then filed a third party defense and indemnity demand against Wiese under a contract which required Wiese to defend and indemnify Exxon for all contract related personal injury claims not caused by the sole negligence of Exxon.[91] Lewis lost when the court found that Exxon was his statutory employer and his claims were therefore barred by the workers' compensation laws. The court also found that Lewis' injuries were caused by the negligence of Exxon and its employee and that, therefore, Exxon was not entitled to indemnity from Wiese. On appeal Exxon argued that it was entitled to recover the costs of defending the suit under the indemnity agreement, relying on the proposition that the indemnitor's duty to defend was similar to the insurer's duty to defend. Therefore, according to Exxon, in determining the duty to defend all the allegations in the petition should be assumed to be true. If after making these assumptions, it appears that the indemnity agreement covers the claims, then the indemnitor should have a duty to defend, regardless of the ultimate outcome of the case. The court, however, rejected this argument stating:

> In the instant case it is clear from the language of the agreement that the parties contemplated that the contractor was to reimburse the principal only after liability had been determined and only in the event the liability did not result from the principal's sole negligence. This situation cannot be equated with the situation arising under an insurance policy requiring the insurer to defend lawsuits against the insured. Obviously, the parties did not intend that where Exxon claims the accident was at least concurrently caused by Wiese that Wiese, under the agreement, is forced to side with Exxon and establish its own negligence.[92]

In rejecting Exxon's pleading argument, the court did not refer at all to its past decisions in *Pearson* and *Sullivan*.

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90. 417 So. 2d 1292 (La. App. 1st Cir. 1982), aff'd, 441 So. 2d 192 (1983).

91. The contract provided:

> "[Wiese] shall defend, indemnify and save [Exxon], its officers, employees, agents and representatives harmless from all claims for injuries to or death of any and all persons, including without limitation, employees, agents and representatives of [Wiese] or its subcontractors, arising out of or in connection with or by reason of work done by [Wiese], its employees, agent, representatives, or subcontractors under this contract, expressly excepting claims for injuries or death caused by the sole negligence of [Exxon], its officers, employees, agents, and representatives."

417 So. 2d at 1303.

92. 417 So. 2d at 1304.

It is possible that the court denied defense costs because Exxon used the insurance analogy and pleading approach in an atypical manner. Usually, the indemnitor uses the pleading approach to argue that it should not be required to defend an indemnitee who successfully defends against allegations of his own negligence. Allowing a negligent indemnitee to use the argument to require the indemnitor to defend him seems unjust. Conversely, allowing a non-negligent indemnitor to use the pleading approach to refuse to defend an allegedly negligent indemnitee who is ultimately found free of negligence may further the ends of justice. Thus, the court may have refused to apply the pleading approach in this case because, under the peculiar circumstances, the pleading approach would have produced an unjust result. If the pleading approach were applied to the *Lewis* case today, no unjust results would occur because the Louisiana Oilfield Indemnity Act would void that part of the agreement providing for defense and indemnity in cases where Exxon was concurrently negligent with another tortfeasor.

While the particular circumstances in *Lewis* may explain the rejection of the pleading approach, the circumstances in *Livings v. Service Truck Lines of Texas, Inc.*[93] were quite different. Livings, an employee of M & G Testing & Services, Inc., sued Service Truck Lines of Texas and the Amoco Production Company alleging that the negligence of Service and Amoco caused injuries which he sustained while testing a drill pipe owned by Amoco. Service and Amoco then filed third party defense and indemnity claims against M & G pursuant to the indemnity agreements in their contracts. M & G then filed motions for summary judgment alleging that the indemnity agreements were invalidated by the Louisiana Oilfield Indemnity Act. The trial court granted M & G's motion for summary judgment, and Service and Amoco appealed. On appeal, Amoco argued that, even if the Louisiana Oilfield Indemnity Act was applicable, summary judgment was improper because the indemnitee must be found at fault before the indemnity agreement is voided by the Act. Thus according to Amoco, if it were found free of fault, it would still be entitled to a defense under the agreement. Citing *Home Insurance Co. v. Garber Industries*,[94] the court accepted Amoco's reasoning and found that summary judgment was improper since under the Act and the indemnity agreement Amoco would be entitled to the costs of defense if it were ultimately found free of negligence.

This case clearly follows the outcome approach. It does not, however, distinguish or refer in any way to the Louisiana cases which use the pleading approach, and it relies upon a federal case predating *Sullen*. It is possible that this case was decided without the court's awareness

93. 467 So. 2d 595 (La. App. 3d Cir. 1985).
94. 588 F. Supp. 1218 (W.D. La. 1984).

of the pleading approach, and thus, the court may have inadvertently neglected to consider it.

Summary of the State Court Activity

It appears that the Louisiana courts have approached the obligation to defend on a case by case basis. Often the issue of the obligation to defend has been treated in a cursory manner with little discussion and no reference to other cases which have considered the obligation. At other times, it appears that only one side of the argument was presented. No case has discussed the issue in detail and compared the merits of the outcome approach to the pleading approach. The result has been a hodgepodge of apparently inconsistent opinions. Nevertheless, a close examination of the recent decisions reveals a line of cases apparently applying the pleading approach, followed by three cases apparently rejecting the pleading approach in favor of an outcome approach.[95] It may be possible to explain these three conflicting cases without rejecting the pleading approach, since in two of them the contracts specifically mentioned attorneys' fees as an object of indemnification, and in the third case the pleading argument was presented in an unusual manner that would have created an unjust result. On the other hand, the cases could have reached inconsistent and irreconcilable results because of a failure to find and consider other cases dealing with the same issue.

THE ARGUMENTS SUPPORTING THE TWO APPROACHES

Since the obligation to defend was not the major issue in most cases until recently, it is not surprising that none of the state or federal cases contains an analysis of the arguments supporting both approaches. A few arguments can be gleaned from a careful reading of some of the more detailed opinions, and other arguments appear sporadically without much detail in some of the briefs. By combining and expanding upon the skeletal arguments in both the opinions and the briefs, the arguments on both sides can be compared. This process yields a strong case in favor of the pleading approach, which is surprising in light of the controversy that *Sullen* created.

Support for the Pleading Approach

The most basic argument in favor of the pleading approach is based upon the meanings of the words "defend" and "indemnify." The word "defend" means "to contest and endeavor to defeat a claim or demand

95. See *Lewis*, 417 So. 2d 1292; *Rodriquez*, 395 So. 2d 1369; *Harper*, 383 So. 2d 1079; *Sullivan*, 370 So. 2d 672; *Pearson*, 345 So. 2d 123.

made against one in a court of justice."[96] The word "indemnify" means "[t]o restore . . . a loss, in whole or in part, by payment, repair, or replacement" or "to make reimbursement to one of a loss already incurred by him."[97] A "hold harmless agreement" is one which "relievf es] the other party of responsibility."[98] Early indemnity agreements tended to use the words "hold harmless," and courts found that these words included the obligation to defend.[99] Most modern agreements use both the word "defend" and the word "indemnify." The definition of the word "defend" contemplates more than simply a reimbursement of money at the end of a case; it contemplates active efforts before judgment to influence the outcome of a case. These active efforts include much more than hiring counsel. In addition, they may include such things as participating in the investigation of the claim and providing information within one's peculiar knowledge which may assist in the defense. Since the word "indemnify" contemplates reimbursement after a loss or cost has been incurred or established, it would be redundant and meaningless to use both the words "defend" and "indemnify," if the parties intended only to require reimbursement of defense costs at the end of the suit. Since the agreement to "defend" is an agreement to actively participate in the process of defeating a claim, the obligation created by the agreement must be satisfied by participation in the effort from the beginning of the case. In order to fulfill this obligation from the beginning, a party must know at the beginning of the case whether or not he has a duty to defend.[100] Even the proponents of the outcome approach admit the logic, sense and practicality of this argument.[101] This argument is also a primary reason to use the pleading approach in insurance cases.

The second general argument in favor of the pleading approach is that insurance policies are in fact a form of indemnity agreement, and thus, the pleading approach which has been accepted for a long time in the insurance area should apply to general indemnity agreements as well.[102] This argument relies on the fact that liability insurance policies

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96. Black's Law Dictionary, 377 (5th ed. 1979).

97. Id. at 692.

98. Id. at 658.

99. See, e.g., *Pure Oil*, 129 F. Supp. 194.

100. Original brief on behalf of third party defendants-appellants P.B.W., Inc., National Security Fire & Casualty Co., and Integrity Ins. Co. at 18, Knapp v. Chevron, U.S.A., Inc., 781 F.2d 1123 (5th Cir. 1980)(No. 84-3399).

101. Brief of amicus curiae Chevron U.S.A., Inc. in support of the suggestion of en banc and consideration for rehearing of petitioner/appellant, Conoco, Inc., at 3, Meloy v. Conoco, Inc., 784 F.2d 1320 (5th Cir. 1986)(No. 84-4718); Memorandum of amicus curiae, Exxon Corp., addressing those issues raised by the court in its order of May 5, 1986 at 2, id.

102. Original brief on behalf of third party defendants-appellants P.B.W., Inc., National Security Fire & Casualty Co., and Integrity Ins. Co. at 18-19, *Knapp*.

are agreements between the insurance company (the indemnitor) and the insured (the indemnitee) in which the indemnitor agrees to defend and indemnify the indemnitee against claims covered by the agreement (the policy). In general indemnity agreements, the indemnitor also agrees to defend and indemnify the indemnitee in situations covered by the agreement. Both insurance policies and general indemnity agreements often discuss one or more situations in which the parties agree that defense and indemnity are not owed. Thus, under an insurance policy, the insurance company does not agree to defend claims which clearly fall within one of the stated exclusions; courts enforce this right of the insurance company when it is applicable. Likewise, the indemnitee and the indemnitor often agree upon a situation which the agreement will not cover—usually the fault of the indemnitee. Just as the insurance company has the right not to defend when from the pleadings and the terms of the policy it appears that a case clearly falls within one of the policy exclusions, the indemnitor should have the right not to defend when from the pleadings and terms of the agreement it appears that a case falls within the indemnitee fault exclusion of the indemnity agreement. If the insurer has this right even though it agreed to defend claims which might be groundless, surely the indemnitor who does not agree to defend regardless of the truth of the allegations should have the same right to refuse defense if the allegations are within an exclusion.

Other arguments raised in support of the pleading approach apply specifically to the situation in which an indemnitee, who drafted the agreement, seeks to recover defense costs after successfully defending a claim under which it would not have been entitled to indemnity if the defense were not successful. Proponents of the pleading approach argue that the outcome approach creates a potential conflict of interest in this context which the pleading approach avoids.[103] In this situation, it is in the indemnitor's best interest to work against the indemnitee, since he will have no obligation to indemnify or defend if the indemnitee loses. At least one proponent of the outcome approach is willing to admit that this argument has merit.[104]

The proponents of the pleading approach have also argued that requiring an indemnitor to defend an indemnitee against allegations which, if proved, would preclude indemnity violates the principle of construing an agreement against the drafter, since the indemnitee usually drafts the indemnity agreement.[105] In both the oil and gas industry and

103. Original brief on behalf of third party defendants-appellants P.B.W., Inc., National Security Fire & Casualty Co., and Integrity Ins. Co. at 19, *Knapp*.

104. See Memorandum of amicus curiae, Exxon Corp., addressing those issues raised by the court in its order of May 5, 1986, at 2, *Meloy*.

105. Brief for third party defendants-appellees Broadmoor Corp., North River Ins. Co., United States Fire Ins. Co., and International Surplus Line Ins. Co. at 17, Sullen v. Missouri Pac. R.R. Co., 750 F.2d 428 (5th Cir. 1985)(No. 83-3372).

the construction industry, where indemnity agreements are most common, the agreement is usually drafted by the indemnitee. Additionally, the indemnitee frequently has more bargaining power and can be in a position to impose adhesive terms on the indemnitor. Since Louisiana law favors the nondrafting party and the party with the lesser bargaining power, an approach should be used in interpreting the agreement which gives the indemnitor the benefit of any doubt which might exist in the contract. Thus, unless the contract clearly requires the indemnitor to reimburse the indemnitee who successfully defends a case in which the allegations would exclude indemnity if they were true, the indemnitor should not be required to pay such costs. The outcome approach, which requires the indemnitor to pay the costs if the defense is successful, gives the benefit of the doubt to the indemnitee-drafter, contrary to the policy of Louisiana law.

In most indemnity contracts, both "defend" and "indemnify" appear in the clause which defines the coverage of the agreement. Since the same terms qualify each obligation, the proponents of the pleading approach argue that where there is no duty to indemnify there can be no duty to defend.[106] Where the allegations would exclude indemnity if they were true, there is no duty to indemnify if the allegations are proved. If the allegations are not proved, there is no judgment against the indemnitee which would require indemnity. Thus according to this argument, regardless of the outcome of the case there is no duty to indemnify under the terms of the agreement and consequently no duty to defend.

Support for the Outcome Approach

The First Argument

Two arguments are generally used to support the outcome approach. The first argument attempts to refute the insurance analogy. Indemnitees point out that the pleading approach usually requires the insurer to defend, since indemnity for fault of the insured is the specific object of liability insurance policies. Furthermore, the indemnitees point out that the insurers are simply being required to do something which they bargained to do, since insurers specifically obligate themselves to defend regardless of the truth or falsity of the allegations. Indemnitees then argue that the pleading approach has the opposite effect in indemnity cases. The approach usually results in the indemnitor not being required to defend, since indemnity contracts usually do not provide coverage

106. Brief for third party defendants-appellees Broadmoor Corp., North River Ins. Co., United States Fire Ins. Co., and International Surplus Line Ins. Co. at 15, *Sullen*.

for the fault of the indemnitee. Since suits almost always allege fault on the part of the indemnitee, assuming the allegations are true will almost always negate the indemnitee's obligation to defend. Thus, the indemnitees argue that the pleading approach nullifies the duty to defend upon which the parties agreed.[107]

There are several flaws in the indemnitees' attempt to refute the insurance analogy. The indemnitees point out that the pleading approach results in a broadening of the duty to defend in insurance cases and a narrowing of the duty in indemnity cases, and therefore, the two types of cases are not analogous. The reason for the apparent difference created by the application of the pleading approach is that indemnity contracts usually have only one exclusion (fault of the indemnitee), while insurance contracts usually cover fault of the insured and have several other exclusions. Where there is only one exclusion in the agreement, the obligation to defend is necessarily broad from the beginning, and thus, any rule which affects the obligation to defend will probably narrow it. Insurance policies, on the other hand, usually specify several situations in which the insurer does not agree to provide coverage or defense. Thus, the initial obligation is narrower and it is more likely that any approach which affects the obligation will broaden it. In neither case does the pleading approach require the indemnitee or insurer to do something which it has not agreed to do; in the indemnity case, it actually protects the weaker party—i.e., the indemnitor—from being required to do something to which he did not agree.

The indemnitees also imply that, because the pleading approach reaches a different result in the two types of cases, the analogy is not proper. On the contrary, the pleading approach is designed to protect the weaker of the two parties to the agreement. In the insurance case, the weaker party is the insured. In the indemnity case, the weaker party is the indemnitor. Thus, the pleading approach usually protects the party with weaker bargaining power, and the apparent difference in result is actually a similarity which reinforces the analogy.

The argument that applying the pleading approach to indemnity cases nullifies the entire duty to defend is also flawed. The proponents of the outcome approach assume that the plaintiff will never sue an indemnitee without arguing that the indemnitee is at fault. The assumption is clearly wrong. The most frequent type of indemnity case occurs when an employee of a subcontractor sues the primary contractor for injuries sustained on the job. If the subcontractor's workmen's compensation insurance is not available, the employee can sue

107. Supplemental brief for the petitioner-appellant Conoco Inc. on suggestion of en banc and consideration for rehearing at 2-4, *Meloy*.

the primary contractor as statutory employer under the workmen's compensation law without alleging negligence on the part of the primary contractor. There are also situations where fault of the indemnitee is not alleged, because it is vicariously liable for the torts of others such as the indemnitor. Thus the pleading rule, even when it is applied to contracts which do not require indemnity for the fault of the indemnitee, does not completely nullify the obligation to defend.

The Second Argument

The second argument used by supporters of the outcome approach is essentially a freedom of contract argument.[108] The indemnitee usually argues that the language of the contract is very broad and clearly expresses the intention of the parties to encompass almost every type of claim. In the words of Chevron's attorney in *Sullen*:

> Nowhere in the Contract is there any indication that the parties did not intend for this language to encompass every conceivable situation that might arise. Presumably, knowing how to write, the parties could have included specific provisions excluding such an interpretation [that payment of defense costs is required if the indemnitee is found free of fault] had they so desired.[109]

Thus according to this argument, the contract read as a whole clearly expresses the intent of the parties to require the indemnitor to pay defense costs where the indemnitee ultimately is found free of fault; courts must enforce the intent of the parties as clearly expressed in this contract.

The outcome approach, however, does not favor freedom of contract any more than the pleading approach does. The pleading approach does not say that the indemnitor cannot be required to defend claims which allege fault on the part of the indemnitee; rather, it recognizes that the general terms used in most contracts do not require the indemnitor to defend against allegations of indemnitee fault. There is nothing particular to the pleading approach which necessarily prevents the parties from using language that clearly requires the indemnitor to defend against allegations of the indemnitee's fault. It should be noted, however, that while the pleading approach does not prevent the drafting of clauses requiring the indemnitor to defend against allegations of the indemnitee's fault, the Louisiana Oilfield Indemnity Act may void such clauses. Likewise, however, the Act may void the contractual interpretation advocated by the proponents of the outcome approach.

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108. See Memorandum of amicus curiae, Exxon Corp., addressing those issues raised by the court in its order of May 5, 1986, at 7-8, *Meloy*.

109. Reply brief by limited appellant Chevron Chem. Co. at 7, *Sullen*.

In the context of suits alleging fault of the indemnitee where the indemnity agreement is broad, indemnitees also argue that the indemnity agreement provides coverage for all liability except liability based upon a *finding* of the indemnitee's own negligence. Since one of the items indemnified against is always costs or expenses and the only exclusion from coverage is usually fault of the indemnitee, the indemnitees argue that if they prove that the one exclusion does not apply, they have suffered a covered loss to the extent of the expenses of the suit.[110] The answer to this argument is that, since the same situation which triggers the obligation to indemnify triggers the obligation to defend, the same situation which negates the duty to indemnify negates the duty to defend. If the obligation to indemnify is negated or not triggered, as when the indemnitee is not liable to pay any damages, the obligation to defend is likewise negated or not triggered, and no expenses can be recovered from the indemnitor.

APPLYING THE ARGUMENTS

A study of the cases indicates that three factors have influenced the courts in determining whether or not an indemnitee has a duty to defend or pay defense costs. The three relevant factors are the terms of the indemnity agreement, the allegations of the pleadings in the case, and the procedural posture of the case when the issue arises. The terms of the contract can clearly require the outcome approach, clearly require the pleading approach, or not specify which approach is required. The pleadings may allege a set of facts which, if proved, would exclude indemnity; a set of facts which, if proved, would require indemnity; or two or more sets of facts one of which, if proved, would require indemnity and another which, if proved, would exclude indemnity. The posture of the case presents the most variables. The entire case could be settled before trial with no determination of fault. The claim against the indemnitee could be dismissed before trial, but at trial part of the fault could be assigned to the indemnitee. The claim against the indemnitee could be dismissed before trial, and at trial the indemnitee could be found free of fault. The claim against the indemnitee could be dismissed before trial, and at trial the indemnitee's fault might not be addressed. The indemnitee might remain in the case at trial, and the plaintiff might prove a set of facts which would exclude indemnity under the agreement. The indemnitee might remain in the case at trial, and the plaintiff might prove a set of facts which would require indemnity under the agreement. Or finally, the plaintiff could fail to prove his

110. Original brief of third party plaintiff-appellee Chevron U.S.A., Inc. at 10-12, *Knapp*.

case at trial. Combinations of these factors lead to a number of potentially different situations. Fortunately, everyone seems to agree upon the correct result in some of the situations.

Absent a specific statute (such as the Louisiana Oilfield Indemnity Act) or public policy voiding contract terms, everyone agrees that the terms of the contract can specifically state how the obligation to defend will be determined. Thus, if the parties choose to use language which forces a determination based upon the pleadings, the pleadings will obviously control. Likewise, if the parties choose language which clearly states that the outcome will control the duty to pay defense costs, the outcome will control. Although most contractual language is not specific enough to force a particular result, some parties have chosen very specific language. For example, the contract in *Thibodeaux v. Texas Eastern Transmission Corp.* specifically provided:

> "[McDermott] assumes entire responsibility for any third party claims and actions based upon . . . injuries . . . to persons . . . sustained . . . in connection with or . . . incidental to the performance of this agreement . . . regardless of whether such claims of actions are founded in whole or in part upon alleged negligence of . . . [Texas Eastern] . . . . [McDermott] further agrees . . . to defend any claim or suit or action brought against [Texas Eastern] . . . and to pay all damages, losses, costs and expenses, including reasonable attorneys' fees incurred by [Texas Eastern] . . . as a result of the claim or institution of any suit or action or the defense thereof."[111]

The presence of the phrase "founded in whole or in part upon alleged negligence of [Texas Eastern]" makes it abundantly clear that the final outcome on the liability issue will not determine the obligation to defend under this contract. The language of the contract in *Lee v. Allied Chemical Corp.* was also very specific. The contract stated:

> "[NATIONAL MAINTENANCE] shall be responsible for and shall indemnify, exonerate and save harmless ALLIED CHEMICAL . . . against:
>
> . . .
>
> b) Any and all liability, damage, loss cost, expense, claims, demands, suits, actions, judgments, or recoveries for or on account of any injury to or death of persons . . . *whether or not any such injury, death, or damage may have been caused or alleged to have been caused by the negligence (whether*

111. *Thibodeaux*, 548 F.2d at 587 n.13.

> *classified as active, passive, or otherwise) of ALLIED CHEMICAL, or the condition of the premises or otherwise,*
>
> And [NATIONAL MAINTENANCE] shall at its own expense defend any and all actions based thereon."[112]

Here again, the language, "whether or not any such injury, death, or damage may have been caused or alleged to have been caused by the negligence . . . of Allied Chemical," makes it clear that the ultimate outcome on the liability issue shall have no bearing on the obligation to defend.

At first it may seem strange that no contracts in the cases discussed clearly specify that the indemnitor will have no obligation to defend cases based upon allegations of the indemnitee's negligence. There are also no contracts which specifically require the indemnitor to pay the costs of defense if the petition alleges fault of the indemnitee and the indemnitee is found free of fault. Nor are there any contracts which specifically say that the indemnitor is not bound to pay the costs of defense if the pleadings allege fault on the part of the indemnitee and the indemnitee is found to be at fault. It must be remembered, however, that most of the contracts in the cases discussed in this article were written at a time when the law allowed the indemnitee to be indemnified against its own negligence if the contract specifically mentioned indemnitee negligence. Indemnitees, therefore, drafted their contracts in the broadest possible terms to take maximum advantage of the law. Contracts freeing the indemnitor of the obligation to defend against allegations of negligence, or contracts freeing the indemnitor of the obligation to pay defense costs if the indemnitee were found free of fault, would give the indemnitee-drafter less protection than the law and his bargaining power allowed. Thus, such clauses do not appear in early contracts, and the contracts are as indemnitee-oriented as possible. Nevertheless, no one appears to have argued that during the time when the law permitted an indemnitee to be indemnified for his own negligence, the parties were not free to specify in their contract exactly how the obligation to defend would be determined. The same freedom remains today subject to whatever limitations the Louisiana Oilfield Indemnity Act may impose.

Everyone also seems to agree that, since the passage of the Louisiana Oilfield Indemnity Act, the law no longer permits the indemnitee to recover indemnity or defense costs if it is ultimately found to be at fault. The questions arise when the case against the indemnitee is disposed of without a determination of the fault of the indemnitee or when the indemnitee is ultimately found to be free of fault. The remainder of

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112. *Lee*, 331 So. 2d at 609-10 (emphasis by the court).

this section will discuss the arguments of both sides in the context of these situations.

The first scenario concerns a case which is settled before it goes to trial. In such a case the outcome approach cannot be used to determine the obligation to pay defense costs, because the fault of the indemnitee has not been determined. The settlement could, of course, specify who would pay the defense costs, but if defense costs were not covered in the settlement agreement or if the indemnitee was not a party to the settlement, how would a court determine who was liable for the defense costs? The court could hold a mini trial to determine the fault of the indemnitee, but this would defeat one of the major purposes for settling a case—avoiding a costly trial. Thus, the only practical means of determining who is liable for defense costs under this scenario is the pleading approach. If, assuming the allegations are true, indemnity would be owed, then the indemnitor should be required to pay defense costs. But if, assuming the allegations are true, the indemnitor would not be required to indemnify, then he should not be required to pay the indemnitee's defense costs.

Next, consider the case where the indemnitee's fault has not been established and the pleadings allege facts which, if proved, would exclude indemnity under the contract. If the contract language is not specific enough to force a pleading approach or an outcome approach, the court must decide what a fair construction of the agreement requires. The rules of construction require the court to resolve any ambiguities against the drafter, who is usually the indemnitee. Since the assumption is that the terms of the contract are not specific enough to force a particular approach, the court should adopt an approach which favors the non-drafting indemnitor. To favor the indemnitor, all doubts must be resolved against requiring defense. The pleading approach would not require defense under this scenario, regardless of the final outcome as to indemnitee fault.

Other arguments also support the pleading approach under this scenario. If the indemnitee loses its case, neither indemnity nor defense will be owed. If the indemnitee wins its case, there will be no judgment to indemnify against. Furthermore, the indemnitee probably carries a general liability insurance policy to cover the defense costs in suits against it. Forcing an indemnitee to pay its own defense costs when its own fault is alleged should cause an indemnitee to be more careful in avoiding acts which may lead to suits alleging its negligence, since its insurance premiums will go up each time it is sued. If the indemnitor is required to pay defense costs under this scenario, it is being required to pick up a cost normally insured against by the indemnitee, and there is less incentive for the indemnitee to be careful. Thus, the indemnitor is being required to serve a liability insurance function. The legislature clearly expressed its disfavor at allowing an indemnitee to shift any part of its

liability insurance burden when it passed the Louisiana Oilfield Indemnity Act.

Perhaps the strongest argument against requiring the indemnitor to defend in this situation is the irony which the outcome approach requires. If the outcome approach is used, the indemnitor is encouraged to aid the plaintiff rather than the indemnitee, because if the plaintiff wins the case against the indemnitee, the indemnitor will not be required to pay defense costs or the judgment. Therefore, the indemnitee is in fact asking for aid from a person whose interests are diametrically opposed to its own. This is particularly true if the indemnitor is also sued. If he can succeed in shifting liability from himself to the indemnitee, he can avoid both the cost of a judgment and defense costs.

Consider also the situation in which the pleadings allege facts which, if proved, would require indemnity. In this situation the pleading approach would require the indemnitor to defend regardless of the truth of the allegations. This situation usually arises when the indemnitee is vicariously liable in some manner for the torts of the indemnitor. In exchange for being relieved of the defense burden when that result would encourage the indemnitee to be more careful, the indemnitor must bear the defense burden when it will encourage him to be more careful. Thus, it is not surprising that no indemnitee has argued against the pleading approach in a case under this scenario. In fact, there are apparently no cases in which an indemnitor has argued that he should not be required to defend the case if the allegations are such that indemnity would clearly be required if the allegations were proved. Instead, indemnitors try to argue that the alleged facts, even if proved, would not require indemnity under the contract.

Finally consider the situation where the pleadings allege at least one set of facts which, if proved, would require indemnity and another set which, if proved, would exclude indemnity. The pleading approach would require the indemnitor to defend such a case because the pleadings do not clearly exclude coverage; they permit proof of a set of facts which might require both defense and indemnity. In this situation, the pleading approach may allow an even broader duty to defend than the Louisiana Oilfield Indemnity Act, since the Act would clearly prohibit the payment of defense costs if the indemnitee were ultimately found at fault and might, because of the allegations of the indemnitee fault, prohibit defense costs even if the indemnitee were not found at fault.

Conclusion

On the whole, the pleading approach seems to provide a reasoned and fair answer in all situations. The outcome approach, on the other hand, gives little assistance in determining the obligation to defend when the case is disposed of before the fault of the indemnitee is determined.

It also gives little aid where the allegations of the pleadings permit proof of a set of facts requiring indemnity and the plaintiff fails to prove his case. The pleading approach does not abridge the freedom to contract as the proponents of the outcome approach claim, and the mere fact that the results in indemnity cases may be different from the results in insurance cases does not demonstrate any flaw in the approach, since the drafting position and bargaining power of the parties is different in the two types of cases which are otherwise very similar. Finally, the pleading approach is in line with Louisiana law which favors the non-drafting party against the drafting party, and the party with less bargaining power against the party with adhesion level bargaining power.